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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 25 of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket No. 93-25
	)	
Direct Broadcast Satellite Public Service Obligations	)	

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REPLY COMMENTS OF THE CORPORATION OF PUBLIC BROADCASTING

I. INTRODUCTION

The Corporation for Public Broadcasting ("CPB") hereby submits these Reply Comments in response to certain comments filed pursuant to the Commission's Notice of Proposed Rule Making, 8 FCC Rcd 1589 (1993) ("Notice") in the above-captioned proceeding. As in the Comments that CPB participated in earlier in this proceeding, these Reply Comments focus on the provisions of Section 25(b) of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act", amending the Communications Act of 1934) which require the reservation of capacity for noncommercial educational and informational programming. [1]

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[1] In response to the Notice, CPB and America's Public Television Stations ("APTS") filed Comments jointly on May 24, 1993 ("APTS/CPB Comments"). CPB and APTS now are filing separate reply comments in order to emphasize different issues and thereby strengthen the position of public broadcasting before the Commission in this matter.

CPB is the private, nonprofit corporation described by the Public Broadcasting Act of 1967 ("1967 Act"), as amended, 47 U.S.C.A. Sec. 390 et. seq. (1991 ed.). CPB is filing these Comments as the organization authorized by Congress to encourage the growth and development of public radio and television broadcasting, as well as nonbroadcast telecommunications technologies, for the delivery of public telecommunications services, and to promote "a national policy that will most effectively make public telecommunications services available to all citizens of the United States" ... "through all appropriate available telecommunications distribution technologies." 47 U.S.C.A. Sections 396 (a)(1), (2), (7) and (9).

CPB's participation on matters related to the provision of video communications services, and the use of new and future technologies for the delivery of such services flows from CPB's statutory mandate. Through CPB's participation in this and other proceedings related to evolving telecommunications services and technologies, we want to ensure that all telecommunications technologies and systems will be readily available for use by current and potential providers of noncommercial public services. This will facilitate their continuing efforts to better the lives of our citizens through the provision of innovative, noncommercial public services of the highest quality.

In these Reply Comments, CPB primarily is responding to the comments filed by DirecTV, Inc. ("DirecTV"), United States Satellite Broadcasting Company, Inc. ("USSB"), Primestar Partners L.P. ("Primestar") and Discovery Communications, Inc. ("Discovery").

II. DBS PROVIDERS' OBLIGATION TO RESERVE CHANNEL CAPACITY FOR NONCOMMERCIAL PROGRAMMING OF AN EDUCATIONAL AND INFORMATIONAL NATURE IS NOT SEPARATE FROM THE OBLIGATION TO OBTAIN SUCH PROGRAMMING FROM NATIONAL EDUCATIONAL PROGRAM SUPPLIERS

Contrary to the assertions of DirecTV, Primestar and USSB, Section 25(b)(1) clearly establishes the basic requirement for reserving DBS channel capacity under the Act and Section 25(b)(3) mandates that this requirement be fulfilled by making channel capacity available to national educational programming suppliers. DirecTV tries to make an argument that Section 25(b)(3) is merely an optional subset of the ways in which a DBS provider may fulfill its public interest obligations under Section 25(b)(1). DirecTV Comments at 6, 18, 22 and 24. Primestar believes that DBS providers may satisfy this public interest requirement by means other than leases of channel capacity to "qualified program providers." Primestar Comments at 20-21. USSB likewise notes that "[f]rom whom the educational and informational programming is obtained should necessarily be of lesser importance." USSB Comments at 13. Such claims, however, are totally without basis in the language of the statute or in the legislative history.

A. The Plain Language of the Cable Act

There is nothing stated or even remotely suggested in the language of Section 25 which indicates that Sections 25(b)(1) and 25(b)(3) are separable or that Section 25(b)(3) is optional. Section 25(b)(1) requires that the FCC establish rules under which DBS providers who offer video programming as part of their service reserve between 4% and 7% of the provider's channel capacity exclusively for noncommercial programming of an

educational or informational nature. Section 25(b)(3) states that "[a] provider of direct broadcast satellite service shall meet the requirements of this subsection by making channel capacity available to national educational programming suppliers, upon reasonable prices, terms, and conditions, as determined by the Commission under paragraph (4) (emphasis added)." It is clear that in order to comply with subsection (b) of Section 25, DBS providers must make channel capacity available to national educational program suppliers at reasonable rates. No other conclusion is possible.

from which DBS providers may obtain noncommercial programming to satisfy their public service obligation. DirecTV Comments at 6. In fact, there is no inconsistency. Section 25(b)(1) establishes the required reservation of capacity for certain noncommercial programming. Section 25(b)(3) and Section 25(b)(5)(B) define the qualifying programming by identifying the only acceptable sources of all such programming. And as explained in Part III, below, this was how Congress intended to define the requisite programming all along.

Finally, DirecTV also tries to distinguish and thereby disassociate Section 25(b)(3) from Section 25(b)(1) by pointing out that the identification of the programming in 25(b)(1) contains the words "educational or informational" and the identification of the programming suppliers in Section 25(b)(3) only contains the word "educational". This obviously is a distinction without a difference.

"National educational programming supplier", as used in Section 25(b)(3) is a term of art which is defined in Section 25(b)(5)(B). Therefore, the colloquial meaning of the words "educational programming" within that term of art is not necessary or relevant to interpreting Section 25(b)(3) or any other paragraph of Section 25(b).

The focus should be on the definitions of the terms, not their component parts. Then it is clear that the words "or informational" in Section 25(b)(1) are not meant to distinguish that paragraph from Section 25(b)(3).

B. Legislative History of the Cable Act

The legislative history does not provide any support for the position that Section 25(b)(3) is a separable paragraph which merely offers DBS providers an optional source of noncommercial programming. The Conference

Report states just as unequivocally as the statutory language that "[s]ubsection (b)(3) requires that a DBS provider make this [reserved] channel capacity available to national educational program suppliers at reasonable prices, terms and conditions as determined by the Commission." Conference Report at 99. Similarly, the description of the original Senate bill in the Conference Report also unequivocally states that "[i]n complying with this requirement, a DBS provider shall lease its capacity to national educational programming suppliers on reasonable prices, terms, and conditions, and shall not exercise any editorial control over this programming." Id. at 100.

In describing Section 25(b)(1), the Conference Report also explains that the FCC must require that DBS providers reserve 4% to 7% channel capacity for noncommercial public service "uses". Id. at 100. This is a hold over from the House amendments to the original Senate bill which directed the FCC to require that DBS providers reserve capacity for noncommercial public service "uses". The House amendment defined "public service uses" to include: (i) programming produced by public telecommunications entities, including independent production services; (ii) programming produced for educational, instructional, or cultural purposes; and (iii) programming produced by any entity to serve the disparate needs of specific communities of interest, including linguistically, distinct groups, minority and ethnic groups, and other groups." Id. at 99. In short, the special "uses" for which DBS providers were to reserve channel capacity were defined solely by the acceptable sources of the programming which fit into that category of special "uses". Thus, it is clear that throughout the history of this legislation, Congress

chose to focus on certain sources of programming to determine and explain how the reservation requirements could be satisfied. In so doing, Congress has granted considerable flexibility in the range of programming sources from which DBS providers can select in satisfying their public service obligations; but Congress certainly has not granted the unlimited flexibility that DirecTV, USSB, Primestar, Discovery and others demand.

III. "NATIONAL EDUCATIONAL PROGRAMMING SUPPLIERS" SHOULD NOT INCLUDE ANY FOR-PROFIT ENTITIES

The Commission has asked to what extent certain definitions in Section 397 of the Communications Act should be taken into account in applying the definition of "national educational programming supplier" as it is set forth in Section 25(b)(5)(B) of the Cable Act. Notice at para. 43. In response, several commenters propose definitions for the term "national educational programming supplier" which depart substantially from the statutory definitions of the terms of art that are used in Section 25(b)(5)(B) of the Cable Act. Discovery, for example, proposes that "national educational programming supplier" be defined to include any entity that provides noncommercial programming of an educational or informational nature, including its "Ready, Set, Learn" service on The Learning Channel. Discovery Comments at 6-7. USSB similarly proposes to include any entity providing noncommercial programming. USSB Comments at 10-11. DirecTV explicitly proposes to include certain for-profit entities, such as Mind Extension University and The Learning Channel, that gather educational or informational programming from noncommercial suppliers. DirecTV Comments at 23. CPB cannot agree with such over-inclusive definitions.

The definition of "national educational programming supplier" in Section 25(b)(5)(B) includes two terms of art that are used elsewhere in the Communications Act of 1934 ("qualified noncommercial educational television station" and "public telecommunications entity") and the undefined term "public or private educational institutions." "Qualified noncommercial educational television station" is apparently drawn from Section 5 of the Cable Act which requires certain cable television systems to carry the signals of certain noncommercial educational television stations. The term is defined in Section 5(l)(1) of the Cable Act to include noncommercial educational televisions stations licensed (as of March 29, 1990) to entities that are eligible to receive a certain kind of grant assistance from CPB. The term "noncommercial educational broadcast station" is also defined specifically in Section 397(6) of the Communications Act, but for the purposes of Section 5 of the Cable Act it also includes other stations and translators that the Commission may determine to be "qualified". In addition, the term "public telecommunications entity" is defined in Section 397(12) of the Communications Act, which in turn incorporates the term "noncommercial telecommunications entity" (as that term is defined in Section 397(7) of the Communications Act). See, Notice at para. 43, fn. 46; and APTS/CPB Comments at 21, fn. 19, for relevant definitions from Section 397 of the Communications Act.

As defined in Section 397 of the Communications Act, neither the term "qualified noncommercial educational television station" nor the term "noncommercial educational broadcast station," nor the term "public telecommunications entities" encompasses any for-profit business entity.

Many not-for-profit entities with no connection whatsoever to public broadcasting (e.g., Hispanic Instructional Television Network or C-SPAN, for example) would come within the broad scope defined for "national educational programming suppliers," but CPB sees no reason why these terms of art should be read in Section 25 of the Cable Act to include any for-profit entity. Moreover, Section 25(b)(4) of the Cable Act refers explicitly to "the non-profit character of the program provider" as a consideration in determining reasonable prices. Thus, for the purposes of Section 25 of the Cable Act, the terms used in the definition of "national educational programming supplier" in Section 25(b)(5)(B) should be interpreted as they are defined for the purposes of Section 397 of the Communications Act, and should exclude any for-profit entities. The term "public or private educational institution" in Section 25(b)(5)(B) should be interpreted similarly, as limited to non-profit educational institutions.

IV. CONCLUSION

For the foregoing reasons, CPB urges the Commission to establish regulatory policies for DBS that protect and foster the development and distribution of noncommercial public services.

Respectfully submitted,

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